BRB No. 99-1117

TIMOTHY SANSONE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS	)	DATE ISSUED: 7/27/2000
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

P. Matthew Darby (Albertini & Darby, L.L.P.), Baltimore, Maryland, for claimant.

William H. Kable (Semmes, Bowen & Semmes), Baltimore, Maryland, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (99-LHC-0331) of Administrative Law Judge John C. Holmes rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant sustained an injury to his neck in the course of his employment on January 30, 1996. He was diagnosed with a herniated disk, and, on May 24, 1996, Dr. McAfee performed a diskectomy and fusion at C6-7. Cl. Ex. 1. Claimant returned to work on November 4, 1996. Claimant is a member of ILA Local 1429, which supplies various waterfront employers with labor for container repair, lashing, line handling and warehouse work. Paul Kursch, president of the local, deposed that the job of container repairman is physically the most demanding job, and that cleanup work is the easiest. Cl. Ex. 20 at 5.

Claimant secures work from the union hall on a day to day basis. According to claimant's testimony, as corroborated by Mr. Kursch, during cold weather, when the more senior members do not want to work outside, he is able to get some of the lighter duty jobs. Cl. Ex. 20 at 10. Claimant also occasionally obtains Trailer Interchange Report (TIR) jobs, which involve inspections while walking around with a clipboard and a pen; these jobs are described as easy, and, due to their desirability, are difficult to obtain for employees such as claimant who have low seniority. Cl. Ex. 20 at 34-36. Claimant also has owned and managed his own health club for 15 years. Employer paid claimant for two periods of temporary total disability. 33 U.S.C. §908(b). Claimant sought an award of permanent partial disability benefits based on a loss of wage-earning capacity, or in the alternative, a nominal award.

In his decision, the administrative law judge found that claimant has not demonstrated that he is incapable of pursuing his usual work as a longshoreman. The administrative law judge also found that claimant sustained no loss of wage-earning capacity, as his post-injury earnings are roughly the same as prior to his injury. The administrative law judge further denied claimant a nominal award. On appeal, claimant alleges that the administrative law judge erred in finding that he can perform his usual employment and has no loss of wage-earning capacity, or, in the alternative, in denying him a nominal award. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant first argues that the administrative law judge erred in finding that he can perform his usual employment as a container repairman. In this regard, claimant contends the administrative law judge erred in crediting Dr. Matz's opinion, and in finding Dr. McAfee's opinion supportive of his conclusion. Claimant's usual employment comprises all of his regular duties at the time he was injured. *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 689 (1998); *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982). After discussing the medical evidence of record, the administrative law judge credited Dr. Matz's final diagnosis that imposes no restrictions on claimant, based on Dr. Matz's viewing of a surveillance videotape which he said shows claimant performing "heavy duty work easily, gracefully, with no problems." Emp. Ex. 2 at 49. The administrative law judge also commented that due to claimant's good conditioning, as noted particularly by Dr. Matz, claimant was capable of heavier lifting than an average longshoreman. Decision and Order at 7. The administrative law judge further found that the restrictions placed by Dr. McAfee do not preclude claimant from performing his usual work.

Claimant argues that the administrative law judge should not have given Dr. Matz's opinion any weight because Dr. Matz admitted that he did not know the weight of the items claimant was shown carrying in the videotape, and that, in fact, the items were well within the restrictions imposed by the functional capabilities evaluation (FCE). As Dr. Matz, however, did not impose any work restrictions on claimant's employability, claimant's

argument in this regard is without merit, *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998), and the administrative law judge is entitled to determine the weight to be given to the evidence of record. *See Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

Nevertheless, we must remand this case for the administrative law judge to reweigh the evidence relevant to claimant's ability to perform his usual work, as his conclusion that the restrictions placed on claimant by Dr. McAfee also would not prevent him from performing his usual work is not supported by substantial evidence. Claimant testified that, due to his low seniority, the major part of his usual work was that of a container repairman, allegedly the most physically difficult of the jobs for which his union provided workers. Part of that job involved taking off and lifting heavy tires, with tire and brake drum together weighing 100 pounds. Following an October 3, 1996, FCE, claimant was restricted to handling such weight seldom, 90 pounds occasionally, 45 pounds frequently, and 20 pounds constantly. Based on these restrictions, Dr. McAfee stated claimant could perform medium to heavy work, but after a second FCE administered in 1997, changed the category to light to medium duty. Following the 1997 FCE, Dr. McAfee lowered the allowable weight to be lifted by claimant to 70 pounds seldom, 55 pounds occasionally, 25 pounds frequently, and no lifting at all on a constant basis. Tr. at 30-33. Dr. McAfee explained the change in his opinion was based on his observation that claimant could not handle the harder work and that "any heavy manual labor will cause an exacerbation of [claimant's] position." Cl. Ex. 1 (April 16, 1998 report); Cl. Ex. 16 at 16, 34-36. Claimant testified that his duties as a container repairman included lifting 100 pounds; this exceeds the lifting restrictions imposed by Dr. McAfee. As the administrative law judge did not discuss this evidence, the case is remanded for the administrative law judge to reconsider whether Dr. McAfee's restrictions preclude claimant's performance of all of the duties of his usual employment. *See generally Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988)*; Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985).

Claimant next contends the administrative law judge erred in finding that he does not have a loss in wage-earning capacity. The post-injury wage-earning capacity of a partially disabled employee for whom compensation is determined pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), is equal to his actual earnings if they fairly and reasonably represent his wage-earning capacity. 33 U.S.C. §908(h). Relevant considerations include the employee's physical condition, age, education, and industrial history, as well as the availability of employment which he can perform post-injury. *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). The fact that claimant returns to his pre-injury employment does not preclude a finding that claimant nonetheless has a loss in wage-earning capacity. Factors such as claimant's pain, the need for assistance in performing his work,

and the physical limitations which cause him to avoid certain jobs offered by the hiring hall, are relevant in determining claimant's post-injury wage-earning capacity and may support an award of permanent partial disability benefits under Section 8(c)(21), based on a reduced earning capacity, despite the fact that claimant's actual earnings may have increased. *See generally Metropolitan Stevedore Co. v. Rambo [Rambo II],* 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Container Stevedoring Co. v. Director, OWCP [Gross],* 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *Adam v. Nicholson Terminal & Dry Dock Co.*, 14 BRBS 735 (1981).

The administrative law judge found that claimant's lower wages post-injury reflect that claimant has worked fewer hours and are "readily explained by the loss of work at the shipyards in the Baltimore area, from which claimant was employed, and union rules and perhaps claimant's own attitude of not accepting work that he deemed too difficult." Decision and Order at 6. The administrative law judge commented that "it is disturbing that because of union rules, employer had little if any control over its ability to place claimant in suitable employment." Decision and Order at 7. If claimant is working fewer hours post-injury than pre-injury because he is turning down jobs because he cannot perform the lifting requirements of those jobs due to his work-related injury, this factor may support a finding of a reduced earning capacity. *See Cooper v. Offshore Pipelines Int'l*, 33 BRBS 46 (1999); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Jennings v. Sea-Land Service, Inc.*, 23 BRBS 312 (1990); *see also Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41, 45 n.5 (1999). Mr. Oakley, claimant's former supervisor, deposed that claimant sometimes asked for help lifting pieces of panel, or putting panel sections in, and that some of the other men also asked for help on the heavier jobs. Emp. Ex. 12 at 12. He agreed that claimant asked for more help than some of the other employees who worked for him. Emp. Ex. 12 at 30. Special consideration or help from co-workers is a factor to be considered in determining wage-earning capacity. *See, e.g., Fleetwood*, 776 F.2d at 1225, 18 BRBS at 32(CRT). Moreover, if, because of union rules as to seniority, claimant is not able to obtain work which he can perform, this could establish loss of wage-earning capacity as well. *See generally Delay*, 31 BRBS at 197.

Furthermore, the administrative law judge's statement that "Any slightly lower hours of [claimant's] work are readily explained by the loss of work at the shipyards in the Baltimore area," Decision and Order at 6, demonstrates error on several grounds. Initially, availability of shipyard work is irrelevant to a determination of claimant's wage-earning capacity in this case, as claimant works as a longshoreman at the Port of Baltimore rather than as a shipbuilder in the shipyards. In addition, there is no evidence to support this statement. To the contrary, both Mr. Kursch and claimant testified that there was "full employment" for container repairmen. Cl. Ex. 20 at 24-25. As the administrative law judge did not consider this evidence in determining that claimant has no loss in wage-earning capacity, the case is remanded for further consideration of this issue.

Claimant lastly challenges the administrative law judge's denial of a nominal award in the event he finds that claimant has no current loss in wage-earning capacity. A claimant is entitled to nominal compensation when his work-related injury has not diminished his present wage-earning capacity, but there is a significant potential of future economic harm due to the injury. *Rambo II*, 521 U.S. at 121, 31 BRBS at 54(CRT).

In this case, the administrative law judge erroneously based his denial partly on the premise that "the Benefits Review Board has adopted a skeptical attitude" toward awarding nominal awards. Decision and Order at 8. As the United States Supreme Court in *Rambo* has spoken on this issue, its determination supersedes any prior statement by the Board in this regard. Moreover, prior to *Rambo*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the present case arises, did not preclude the award of nominal awards in certain circumstances. *See Fleetwood*, 776 F.2d at 1234 n.9, 18 BRBS at 32 n.9 (CRT). Furthermore, prior to *Rambo II*, the Board had acquiesced in the holdings of several circuit courts to endorse nominal awards. *See Ward v. Cascade Gen'l, Inc.*, 31 BRBS 65 (1995).

The administrative law judge stated he was tempted to grant claimant a nominal award as claimant is relatively young and has an acknowledged impairment that required surgery, and that may cause problems in the future. The administrative law judge nonetheless denied the award because "any future lack of ability to work because of his work injury would be pure and unwarranted speculation." Decision and Order at 8. He reasoned that claimant has a year from the time of the denial to bring a modification proceeding which is ample time to "test" his work effort out on the waterfront. This approach is contrary to that dictated by the Supreme Court in *Rambo II*, wherein the Court rejected the notion that a claimant should have to apply for modification within one year of every denial of benefits in order to keep any potential future claims open. *Rambo II*, 521 U.S. at 134 n.6, 31 BRBS at 59 n.6(CRT). Thus, as the administrative law judge denied claimant a nominal award based on incorrect premises, we vacate his finding and remand the case for the administrative law judge to reconsider this issue in accordance with the standard set out in *Rambo II*.

Accordingly, the Decision and Order of the administrative law judge is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge